United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL

To be argued by
SPIROS A. TSIMBINOS

B
P/S

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

75-2012

UNITED STATES ex rel. JOSEPH MONTY,

Petitioner-Appellant,

-against-

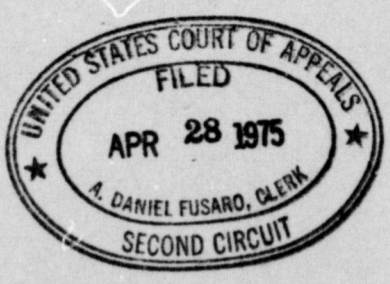
ADAM F. McQUILLAN, Warden, Queens House of Detention for Men, Long Island City Branch, New York, N.Y.,

Respondent-Respondent.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

REPLY BRIEF

FOR PETITIONER-APPELLANT



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This reply brief is submitted in response to Respondent's Brief recently received. Appellant's contention with respect to Point One of our Brief is that the procedure mandated by Executive Order creates a climate pregnate with the opportunity for judicial partiality in favor of the prosecution in a special category of cases, and that, in fact, judicial bias against the appellant was present prior to and during the appellant's trial. On this basis appellant's constitutional rights of equal protection and due process were violated. By respondent's own figures some 168 indictments have been returned before the Special and Extraordinary Term and some 47 defendants convicted before Judge Murtagh. The duration of this extraordinary term and the designation of Judge Murtagh by the terms of the Executive Order 1.63, 9A N.Y.C.R.R. § 1.61-65 (1972), are indeterminate and could conceivably last for several more years. Based on the foregoing the special procedure created which specifically designated one judge to sit in all these cases is different from the case-by-case basis which existed in the cases cited by the respondent in his brief where for particular reasons a judge had to be specifically designated.

The Order also specifically authorized Judge Murtagh to draw and empanel grand jurors and he has acted as legal advisor to the grand juries drawn, and has participated in investigations and preliminary motions of cases which then came before him for trial. In this regard it would appear that Judge Murtagh by acting as "counsel" to a party would be ineligible to serve as a trial judge under Section 14 of the New York State Judiciary Law and under Section 455 and 144 of Title 28 of the United States Code. See also People v. Scott, 34 A.D. 2d 407 (4th Dept., 1971); People v. Corelli, 41 A.D. 2d 939 (2nd Dept., 1973). It should further be noted that in the case at bar the partiality of the Judge toward the prosecutor in this case and in others tried before him in which the Special Prosecutor participated, has over the course of the last two years become readily apparent. In three separate cases, involving two separate appellate decisions of the Supreme Court of the State of New York, convictions have been reversed and Judge Murtagh has been criticized for his numerous rulings and charges which have favored the prosecution. People v. Bell, 45 A.D. 2d 362 (1st Dept., 1974); People v. Levy, __ A.D. _____ (Feb. 24, 1975); N.Y.L.J. (Feb. 24, 1975);

People v. Mackell, __ A.D. _____ (2nd Dept., Mar. 28, 1975); N.Y.L.J. (April 1, 1975). In the Mackell case, supra, a unanimous appellate court stated:-

> "The overall impression given is that the court unduly favored the prosecutor and his cause. This impression is buttressed by the fact that the defense counsel's zeal brought forth harshly censorous language from the bench; whereas there are intimations on the record that the prosecution continuously intimidated witnesses by shouting at them without so much as one word of reproval from the court."

Respondent's efforts to minimize and pass over the instance of bias pointed out in appellant's brief by stating that appellate courts have already passed on these issues neglects to take into account that Mr. Monty's case was the first Nadjari-Murtagh trial coming before a court for appeal review. Where on a one-shot basis incidents which occur during a trial may appear as inadvertent or harmless error, if they appear continuously then a pattern of deliberate action becomes apparent. Where an incident happens once it may be classified as a mistake but when it occurs many times the intentional design cannot be overlooked. Thus in the three cases cited above one of the substantial errors pointed out by the appellate

courts with regard to Judge Murtagh's conduct was his charge to the jury on the question of reasonable doubt to the effect that:

> "If after carefully considering the evidence as a result of reason and judgment and because of the evidence in the case or lack of evidence, <u>you feel in your heart and conscience</u> that the defendant is not guilty under the law as explained to you or if you entertain a reasonable doubt as to his guilt then there exists a reasonable doubt."

The charge which was criticized by the appellate courts was in effect a reversal of the burden of proof and served to confuse the jury. This charge is exactly the same as the one used by Judge Murtagh in the case at bar (R 1311).* In addition as an added instance of bias toward the appellant Judge Murtagh specifically told the jury:

> "Ask yourselves whether a gift of the use of cars such as defendant Monty received would be given <u>solely</u> on the basis of friendship.
>
> Ask yourselves whether the defendant Monty could have reasonably expected <u>such generosity without the necessity of compensating Avis in some manner</u>.
>
> You are to use your common sense. You do not leave your common sense outside the jury room (1327). (Emphasis supplied.)"

* On the basis of these developments one wonders whether if Mr. Monty's case was now before the Appellate Division a different decision would have been rendered.

Thus the impression sought to be conveyed by the respondent that the issues have been litigated to death is false and this court should take a new and fresh look at the substantial issues raised, issues which go to the very heart of the fundamental right to a fair trial. It should further be noted that the affidavit of Mr. Atlas, the trial attorney for the appellant, attests to the type of action and pressure which occurred in the appellant's trial. The natural reluctance of any attorney to challenge and question a judge is self-evident. The circumstances which would have driven a respected and able attorney such as Mr. Atlas to make an affidavit of the type present in the record attests to its validity and accuracy. One notes that although Judge Murtagh attempted to disclaim the allegations made in Mr. Atlas' affidavit, that he pressured and threatened the appellant in order to get him to testify at the Mackell trial, he conveniently hedged from making an outright forceful denial by saying: -

> "I don't have the kind of memory that would enable me to positively say what took place." (R 1384)

With respect to Respondent's Point II, appellant reiterates that the "overwhelming array of evidence" mentioned by respondent as he did in earlier briefs refers to the issue that Monty used Avis cars,

an issue not in dispute. Proof on the key issue whether an illegal agreement or understanding existed, however, is only inferred from the alleged statements of Massaro. Respondent's attempt to justify Massaro's statements as being against his penal interest in reliance upon U.S. v. Weber, 437 F.2d 327, cert denied 402 U.S. 932 and U.S. v. Glasser, 443 F.2d 999 is also misplaced. In Weber, supra, the contents of the statement involved an admission that money was given, and in Glasser, supra, that the declarant had committed the act of throwing acid on property. In the case at bar Massaro's statements implicate Monty without necessarily implicating himself. In addition there is no showing of an awareness by Massaro that his statements at the time that he made them might be against his penal interest, no showing that Massaro had no motive to lie, and other relevant factors which would qualify the statements as admissions against penal interest. Richardson on Evidence, 10th Edition, §§ 262 and 263; Wigmore, 3rd Edition, §§ 1461-1463.

With respect to the case of Park v. Huff, 493 F.2d 923 (5th Cir., 1974) respondent is correct that the earlier decision was recently reversed by the full court sitting en banc, (506 F.2d 849). The most

recent decision came down on January 20, 1975 and did not appear in the law reports until February 1975, thus at the time of the writing of appellant's brief we were not aware of the change of decision by the Fifth Circuit. It should be noted, however, that the new holding contains deep divisions among the justices with one of the majority specifically limiting the reasons for his concurrence. It is respectfully submitted that the en banc ruling in Huff, supra, misses the main issue and reasons for the confrontation rule, and its decision may be reversed on further appeal to the United States Supreme Court. Appellant urges this Court in light of its reasoning in U.S. v. Puco, 476 F.2d 1099, to adopt the logic of the original majority in Park v. Huff, supra, and the current dissenting opinion in the en banc ruling. As the dissent by Judge Wisdom aptly stated at 506 F.2d 863:-

> "The majority states:
> 'the issue was whether Pinion and Worley had made the statements. Sealy was the only witness who swore they had. He was cross-examined at length and in detail. That puts an end to the confrontation argument in this case.'

> But the issue was not whether Pinion and Worley had made the statements. . .they may have done so. . .The issue was the truth or falsity of their statements. Park was entitled to confront these accusers. The United States Constitution guarantees him this right."

On the main issue of contention whether an illegal agreement existed to violate a public trust, sufficient indicia of reliability were totally lacking to justify the admission of the hearsay statements of Massaro. Their introduction violated the appellant's constitutional right of confrontation.

Based on the foregoing the appellant's petition for a writ of habeus corpus should have been granted and the order of the court below should be reversed.

Dated: Kew Gardens, New York
April, 1975.

Respectfully submitted,

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